Dear Sir/Madam,

Re: Submission on proposed changes to NSW biodiversity and conservation laws

Ku-ring-gai Council welcomes the opportunity to comment.

On 3 May 2016, the NSW government released a consultation package including a Biodiversity Conservation Bill and Local Land Services Amendment Bill (referred to collectively as, The Bill). The Bill would substantially remodel NSW biodiversity laws and are designed to replace the Native Vegetation Act, Threatened Species Conservation Act, the Nature Conservation Trust Act and parts of the National Parks & Wildlife Act.

Ku-ring-gai Council welcomes the opportunity to comment on this reform package and in this submission, has set out some of the perceived benefits of the reform package while raising a number of concerns related to the Bill. The concerns relate partly to the consultation process and timing and also to the potential negative impact on biodiversity resulting from some of the provisions and changes proposed.

The NSW government has stated the new reform will “cut red tape, facilitate ecologically sustainable development and conserve biodiversity across NSW”\(^1\). Ku-ring-gai Council shares the concerns of many within our community and within the broader community, that this reform package is a step backwards for environment protection and that the Bill fails to appropriately address biodiversity conservation.

The state of biodiversity within NSW, as indicated in the NSW State of the Environment Report (Environment Protection Authority 2015), is in decline.\(^2\) The current legislation is not succeeding in terms of biodiversity conservation and as such Ku-ring-gai Council recognise the need for legislative reform.

The NSW Governments 2014 Independent Review of Biodiversity Legislation\(^3\) proposed a new ‘Biodiversity Conservation Act’, with the goal to maintain a healthy, productive and

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resilient environment for the greatest wellbeing of the community, now and into the future, consistent with the principles of Ecologically Sustainable Development (ESD).

Ku-ring-gai Council considers biodiversity legislative reform to be an opportunity to strengthen biodiversity conservation, streamline biodiversity protections and to ensure that future development is in line with the principles of ESD.

Council considers the reform package proposed by the NSW government to in fact weaken legislative protection for biodiversity and run contrary to ESD.

Whilst Ku-ring-gai Council have provisions for Biodiversity Protection within its planning and assessment instruments, environmental protection is scarcely guaranteed without strong support from state legislation. Further, impacts associated with broad scale clearing and habitat removal across the state will have long term impacts on everyone, including future generations.

The contents of this submission have been endorsed by Ku-ring-gai Council and represent the key concerns and implications for the Ku-ring-gai Local Government Area and the broader concerns in relation to the Bill.

The submission has been broken down into specific themes:

1. The consultation process and timing
2. Specific concerns - the Bill
3. General points
4. Conclusion

The consultation process and timing

Council appreciates the opportunity for staff and community to review and comment on proposed legislative changes.

The reform package released on 3 May 2016 is both very large and very significant consisting of 25 documents and around 657 pages. To appropriately assess the proposed bill and the impacts the changes may have on the community and biodiversity within the Ku-ring-gai Local Government Area (LGA) and across the state, Council and residents require time and other resources.

The Office of Environment and Heritage offered technical workshops on the offsetting provisions and new Biodiversity Assessment Methodology (BAM) in the proposed Bill. Ku-ring-gai staff attended and benefitted from these workshops but note that the issues covered make up only a small part of the Bill.

Many of the provisions within the Bill rely on details to be contained within associated regulations and codes which have not been made public. Further, it is understood that a new State Environmental Planning Policy (Protection of Trees in Urban Areas) 2016 ("SEPP") and a new model development control plan is proposed to replace the Standard Instrument LEP

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provisions (cls5.9, 5.9AA and 5.10) relating to tree removal permits in urban council areas and in urban zones. The new SEPP is also not presently available for comment.

The timing of the exhibition has coincided with the end of financial year, a period of uncertainty in Local Government associated with proposed amalgamations, and requests from the Department of Planning and Environment for high level feedback on 7 State Environmental Planning Policies relevant to Ku-ring-gai.

Council feels the consultation process relating to the proposed Bill has been less than ideal and that the participatory democratic process has not been effectively served.

Notwithstanding the above, Ku-ring-gai has endeavoured to provide comment on the components and principles of the Bill which are most concerning.

**Specific concerns - the Bill**

1.3 Purpose and objects of Act
Ku-ring-gai is concerned with the weakening of the objects within the Bill in comparison to those listed in section 3 of the Threatened Species Conservation Act 1996 (TSC Act) which is proposed to be repealed.

Whilst the TSC Act seeks to ‘prevent the extinction and promote the recovery of threatened species, populations and ecological communities’\(^5\), the proposed Bill seeks only to ‘slow the rate of biodiversity loss’ and is silent on promoting recovery.

Ku-ring-gai Council is firmly of the belief that biodiversity loss should stop, not just be slowed. A critical objective of biodiversity conservation must be the recovery of species not purely conservation of a status quo which includes a downward trend.

In regards to section 1.3(h), Council believes this should be further regulated in the Bill to ensure monitoring and reporting are legal requirements. This was also recommendation number 36 from the independent review, which stated “Develop and implement a robust whole of government monitoring and evaluation framework to enable reporting on the condition (quality and extent) of biodiversity, effectiveness of management actions and the objectives of the proposed new ‘Biodiversity Conservation Act’”\(^6\).

1.5 Biodiversity values for purposes of Act
The biodiversity values described in this section of the act are not comprehensive. Biodiversity values should be described more broadly and reflect the value of all biodiversity, not just threatened species.

"Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of

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\(^5\) Threatened Species Conservation Act 1996, section 3(b)

ecosystems. It is the variety within and between all species of plants, animals and microorganisms and the ecosystems within which they live and interact.

1.6 Definitions
The draft Bill omits many definitions which are required to reduce ambiguity and misinterpretation. For example, the act must contain a broad and accepted definition of biodiversity such as that provided in the Convention on Biological Diversity.

The offsetting hierarchy requires that attempts are made to firstly avoid and then minimise impacts before seeking to offset. In order to facilitate assessment of whether a proponent has satisfactorily attempted to comply with the hierarchy, the terms ‘avoid’ and ‘minimise’ should be defined in the act.

The definition for protected native plant includes a note, which states ‘Some protected native plants may also be threatened species of plants, but not all threatened species of plants are protected native plants.’ Ku-ring-gai questions this statement and considers all threatened species of plants to be protected native plants.

2.4 Damaging habitat of threatened species or ecological community
Council believes the offense outlined in clause 2.4(1) should be expanded to any species or ecological community. Further, Council does not believe that ignorance should be a defence to wilful damage of habitat.

2.16 Reasons for, and appeals against, licensing decisions
Ku-ring-gai Council believes that legal standing should be extended to people or organisations who are not the applicants of a conservation licence but wish to raise an appeal against a decision to grant a biodiversity conservation licence.

Part 3 Areas of outstanding biodiversity value
Section 3.2 Areas eligible to be declared, includes a ‘consultation note’, which states that area of outstanding biodiversity value (AOBV) are not able to be declared on properties where non-commercial hobby activities are carried out or where plant activities by commercial plant growers are carried out. It is unclear what this means and the intention of this consultation note.

Section 3.5(1) states ‘A declaration of an area of outstanding biodiversity value may be amended or revoked by the Minister for the Environment by notice published on the NSW legislation website.’ Council believes the revocation or amendment of an AOBV declaration should be subject to similar or stronger criteria than a declaration of an AOBV (as described in section 3.3 of the Bill).

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7 Convention on Biological Diversity, article 2
8 World Wildlife Fund, What is Biodiversity?
9 Convention on Biological Diversity
10 To see a discussion relating to the ambiguity of ‘avoid’ and the potential for misrepresentation of the term, see https://www.caselaw.nsw.gov.au/decision/55de3701e4b0a95dbff9e2f7 specifically items(24),(29),(40),(44),(45),(47),(86),(88) and findings (97),(98),(99)
Part 4 Threatened species and threatened ecological communities

Council supports a move towards IUCN criteria, as well as towards a single list of threatened species and communities for state and federal legislation. However, such a change must ensure there is no reduction of the number of species on the NSW threatened species lists and maintain the independence of the scientific committee.

4.4 Specific eligibility criteria for listing threatened species.

At the OEH Workshop held in Sydney on 31 May 2016 on the proposed offsetting and Biodiversity Assessment Methodology (BAM), Council was lead to believe that populations were not a category of listing under the proposed Bill. However, section 4.4 (4) states that’ A population is not eligible to be listed as a threatened species if the species to which the population belongs is separately listed (whether of the same or of a higher or lesser threatened category)’. This seems to suggest that populations can be listed for species which are not otherwise listed?

Council is concerned that any removal of a listing category for populations could have negative impacts on biodiversity on a local and regional scale.

Division 1 Biodiversity Conservation Investment Strategy

5.1 Making of Strategy

Council is of the opinion that any amendment of the conservation strategy under section 5.4, with the exception of very minor and inconsequential amendments, should at least require consultation with the Members of Scientific Committee as set out in section 4.41.

Section 5.9(f) appears to consider the indirect, future or unspecified interest of a mining or petroleum authority. Council considers this section unnecessary and inappropriate as it elevates the interests of mining or petroleum above land holders and biodiversity.

5.10 Duration of biodiversity stewardship agreements

Council is deeply concerned of the implications to biodiversity stewardship sites associated with section 5.10(2) which allows for the termination of a biodiversity stewardship site. In order for biodiversity offsetting in the form of stewardship agreements to provide tangible biodiversity outcomes, the agreements must be in perpetuity with terminations only possible in the most exceptional circumstances.

5.16 Proposals by public authorities affecting biodiversity stewardship sites

This section of the proposed Bill is concerning as it removes the perpetuity component of effective offsetting. Section 5.16(2)(c) states that a biodiversity stewardship site can be developed “for a purpose of special significance to the State”. This section is ambiguous and threatens the effectiveness of biodiversity stewardship sites.

Section 5.16(3) states that the minister may specify retirement of credits of a number and class. This is unclear as ‘class’ is undefined and suggests that the requirement to offset a biodiversity stewardship site is at ministerial discretion?

Prospecting and mining on 5.18 biodiversity stewardship sites, 5.23 conservation agreements and 5.28 wildlife refuge agreements
The inclusion of a section specifically placing the interests of prospecting and mining above biodiversity conservation, within an act that is supposed to govern for conservation of biodiversity, is of great concern to Council. Offsets must be in perpetuity and prevent actions that would compromise their biodiversity.

Within biodiversity stewardship sites, biodiversity must be protected.

Section 5.18(4), sets a **maximum** number of biodiversity credits that a holder of a mining or petroleum authority may be required to retire if they pursue action within a biodiversity stewardship site. Firstly, allowing mining or petroleum prospecting or activity within an offset site compromises the integrity of the biodiversity stewardship system. Secondly, Council questions why a maximum credit requirement would be set at a one for one ratio? By limiting the penalty to a one for one, the act provides no disincentive for a petroleum or mining authority to pursue activities within a biodiversity stewardship site and no consideration that the action is most likely offsetting an offset

Impacts within a biodiversity stewardship (offset) site, if allowed at all, should attract a multiplier requiring a greater offset, such as within the existing EPBC Act offset policy.

Section 5.19 is another instance of placing the interests of mining or petroleum authorities above those of community and biodiversity. Council believe there is no place for this kind of preferential law within a biodiversity conservation act.

Sections 5.23 Duration and variation of conservation agreements and 5.28 Duration and variation of wildlife refuge agreements, both seem to allow variation far too easily and again place the interests of mining or petroleum authorities above those of community and biodiversity. Council understands the provisions are largely copied verbatim from the National Parks and Wildlife Act but feel the proposed Biodiversity Conservation Act is an opportunity to strengthen these provisions.

**6.2 Biodiversity offsets scheme**

In general, Council is concerned that the offset system proposed allows for payment into a trust and does not provide reassurance that a like for like offset will be secured (section 6.2(f)).

It is imperative that offsetting provides a ‘improve or maintain’ outcome for biodiversity, through no-net-loss provisions that specify offsets will be used as a last resort, after avoidance, minimisation and mitigation measures have been exhausted.

**6.3 Biodiversity impacts to which biodiversity offsets scheme applies**

Section 6.3(2)(c) specifically excludes indirect impacts, such as impacts on biodiversity values arising from global warming from consideration under the offset scheme. Council is concerned that indirect and accumulative impacts are not assessed at all under the proposed BAM.

Council is extremely concerned with the consultation note at section 6.3 (3)(c), which suggests acceptable variations from the like for like rule within offset sites.

**6.5 Serious and irreversible impacts on biodiversity values**

Council is concerned with the lack of detail associated with the definition and criteria for ‘serious and irreversible impacts on biodiversity values’. Further, Council believe that serious OR irreversible impacts should be considered as red flags.
6.7 Minister may establish biodiversity assessment method
Council is concerned that the proposed BAM (based on the major projects offset methodology) is the weakest offset methodology currently used in NSW and fails to incorporate a comprehensive environmental assessment which would include; the functioning of soils, increased salinity, loss of nutrients and impacts to water among other components… The framework of the 2012 Environmental Outcomes Assessment Methodology is a far stronger assessment methodology and should not be repealed for the far weaker BAM model.

Council believes that any person should be able to bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a biodiversity stewardship agreement or biodiversity certification agreements.

General Comments

1. The protection and management of biodiversity relies upon the fundamental principles of retaining, maintaining and restoring ecosystem structure and function and managing threatening processes to species and populations.

2. The Biodiversity Conservation Act should be designed to prevent extinction and promote the recovery of species across NSW. Any variance from this position is insupportable as it promotes a view that biodiversity decline and extinction are inevitable and acceptable.

3. The reform package must apply a ‘maintain or improve environmental outcomes’ standard to all development. The Bill should include no-net-loss provisions for biodiversity.

4. All details of the proposed Bill must be made publically available at the same time in order to allow for informed public review and comment. This includes the regulations, codes and the proposed SEPP.

5. Biodiversity legislation must consider all biodiversity, marine and terrestrial, threatened and non-threatened.

6. A biodiversity reform package must address key threats such as broadscale land clearing of remnant vegetation and climate change.

7. The Bill must specify offsets will be used as a last resort, after avoidance, minimisation and mitigation measures have been exhausted. Avoidance and mitigation require far more detail to allow consent authorities to assess whether proponents have truly exhausted these options before offsetting is considered.

8. Offsetting must be in perpetuity. Provisions which place mining and petroleum interests above community and biodiversity interests are unacceptable within the proposed Bill.

9. Any use of offsets must strictly require like-for-like. Variance to this rule would compromise the effectiveness of offsetting to conserve biodiversity and would lead to loss of biodiversity.
10. Rehabilitation of mine sites should be a requirement and should not be able to generate biodiversity credits.

11. Any system, such as the proposed Biodiversity Trust, which will allow for payment in lieu of an offset site being established, must adhere to the like-for-like principles. If the trust is unable to ensure a like-for-like offset, then the obligation for offsetting cannot be discharged.

12. Some biodiversity assets and values are simply irreplaceable and the Bill must recognise these areas or ecosystem components as ‘Red Flags’.

13. Any investment in private land conservation must be guaranteed in the long term.

14. Provide a clear requirement for comprehensive data, monitoring and reporting on condition and trends of biodiversity and the effectiveness of management actions.

15. The proposed urban tree clearing SEPP must ensure that the urban forest, comprising of remnant and mature trees outside of bushland reserves, are adequately valued and protected.

16. Reliance on self-assessable codes are in many instances, completely inappropriate as they assume a high level of ecological knowledge that is simply not present in the general community.

17. Part 5 activities under the EP&A Act, as well as state significant development and state significant infrastructure should all be required to meet the same environmental standards as other development.

18. Provisions to declare Areas of Outstanding Biodiversity Value which replace the provisions for listing of Critical Habitat under TSC Act are cautiously welcomed. Critical Habitat listings are chronically underutilised under the TSC Act. The proposed Bill should allow for AOBV’s to be far more easily declared and ensure they become no-go zones for development activities.

19. The Bill should be amended to require the scientific committee to consider the condition and status of all species, not just those formally listed on threatened species lists. From an ecological and economic perspective, it is wiser to prevent biodiversity decline and protect remnant vegetation rather than trying to ameliorate damage to recover threatened species or complex ecosystem systems.

20. Local Land Services or Local Councils in the position of consent authorities should not have discretion to discount offset obligations (with no requirement for public exhibition). This discretionary power places too much pressure on local consent authorities and could compromise biodiversity outcomes.

21. The proposed Bills impact assessment process relies too heavily on mapping and ignores fauna. Requirements for fauna survey must be regulated through the act and cannot purely rely on potential occurrence based on plant community type.

22. In rural and urban landscapes, hollow bearing trees are crucial habitat for numerous native and threatened species. Much tighter regulation must focus on retention of, or at the very least assessment of, these paddock and street trees. Any self-assessable codes
or proposed SEPP which allows land owners or land managers to remove these trees without approval must be changed.

23. The proposed Biodiversity Offsetting scheme fails to satisfy ESD Principles in terms of Inter-generational Equity (and Intra-generational Equity although this Principle is not currently included in NSW legislation), the precautionary principle as it fails to mandate like for like, and True Valuation as its section reduces the calculation of ‘loss’ to purely financial terms.

24. The Bill promotes the notion that a continued net loss of biodiversity is consistent with the ESD Principles. However, this position is completely inconsistent with all of Principles of ESD. There is abundant empirical evidence that indicates net loss both historically and on trend. The reversal of this trend through a zero net loss or betterment objective is required in the Bill in order to be consistent with ESD.

**Conclusion**

With the state of biodiversity declining in NSW and across the country, Council supports efforts to strengthen and streamline biodiversity conservation legislation.

However, even from the limited information available, it is clear that the NSW government has got the balance between biodiversity and development completely wrong and is attempting to introduce a new regime which elevates the interests of a marginal group of farmers, developers and miners above the irreplaceable value of biodiversity.

Council urge the state government to withdraw the proposed Bill and work with the community, scientists, landholders and other stakeholders to draft a reform package which aims to stop biodiversity decline and promote recovery of all our species and ecosystems.

Thank you for the opportunity to comment. We hope that you take the time to consider our submission. If you require further information contact Jacob Sife or e-mail jsife@kmc.nsw.gov.au.

Yours sincerely

Andrew Watson
Director Strategy and Environment